115 Box 47 - JGR/Recess Appointments (2) – Roberts, John G.: Files SERIES I: Subject File

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 13 1983

MEMORANDUM FOR RICHARD A. HAUSER
Deputy Counsel to the President

Re: Recess Appointments to the Board of Directors of the Corporation for Public Broadcasting

This responds to your request for our opinion on whether the President is authorized to fill a vacancy in the Board of Directors of the Corporation for Public Broadcasting (Corporation) by means of a recess appointment. U.S. Const. art II, § 2, cl. 3. 1/ More specifically, we have been asked whether there is any objection to the appointment of Mr. William Lee Hanley, Jr. to a vacancy which occurred upon the expiration last fall of the term of Mrs. Gillian Martin Sorensen. Mrs. Sorensen has continued to serve on the Board as a holdover member since the expiration of her term. After a review of the Corporation's statute and legislative history, relevant case law and prior opinions of the Attorney General and this Office, we have concluded that there is no legal obstacle to such a recess appointment.

I. Recess Appointments

The President's power to make recess appointments is a corollary of his power to appoint, with the advice and consent of the Senate, officers of the United States. U.S. Const. art. II, § 2, cl. 2. His power to fill vacancies is thus coextensive with his power to fill them originally. McCalpin v. Dana, No. 82-542 (D. D.C. October 5, 1982), appeal docketed, No. 82-2318 (D.C. Cir. November 3, 1982), slip op. at 4-5. Unless there is a clearly expressed legis-

1/ The Recess Appointments Clause provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

lative intent to the contrary, therefore, id. at 10, positions held by officers of the government may be filled by the President under the Recess Appointments Clause. 2/ The McCalpin court quoted Staebler v. Carter, 464 F. Supp. 585, 592 (D.D.C. 1979), in which Judge Harold Green, considering recess appointments to the Federal Election Commission, said:

> The Court finds it difficult to believe that, had the Congress intended to take the significant step of attempting to curtail the President's constitutional recess appointment power, it would not have considered the matter with more deliberation or failed to declare its purpose with greater directness and precision.

Before reading such an unusual limit into a statute, we believe that the courts would require a clear and explicit statement by Congress that it intended to accomplish such an objective.

Here, we are aware of nothing in the Corporation's enabling act or its legislative history that evidences a Congressional desire to restrict the President's appointment power. Rather, there is affirmative evidence that attempts to limit the President's authority over appointments were rejected when the Corporation was set up in 1967. Although the original legislation provided for a fifteen member Board appointed by the President, the suggestion was made during hearings that more diversity would be insured if six of the fifteen were elected by nine appointed members. S. Rep. No. 222, 90th Cong., 1st Sess. 13 (1967). Although the Senate Committee adopted the suggestion, it was rejected by the House and the original language was retained. H.R. Rep. No. 572, 90th Cong., 1st Sess. 15, 27 (1967). Thus, an attempt to weaken the President's appointment power was rejected.

In 1981, the statute was amended to revise the Board's makeup. The number of Board members was reduced to ten, and two of the ten positions were reserved for one representative each from among the public television stations and the public radio

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2/ The President's acknowledged power to appoint whomever he wants as a member "is inconsistent with a statutory construction that would restrict the President's power under the Recess Appointments Clause." McCalpin, supra, slip op., at 10.

stations. 47 U.S.C. § 396(c)(3) (Supp. V 1981). 3/ The provision permitting members to holdover until their successors were qualified, 47 U.S.C. § 396(c)(4) (1976), was deleted. See 47 U.S.C. § 396(c)(5) (Supp. V 1981). Finally, the language governing vacancies was changed. Rather than being filled "in the manner in which the original appointments were made," 47 U.S.C. § 396(c) (5) (1976), they are now to be filled "in the manner consistent with this chapter." 47 U.S.C. § 396(c)(6) (Supp. V 1981). We have not found any legislative history discussing these last two changes.

3/ This provision provides:

> (3) Of the members of the Board appointed by the President under paragraph (1), one member shall be selected from among individuals who represent the licensees and permittees of public television stations, and one member shall be selected from among individuals who represent the licensees and permittees of public radio stations.

"[T]he President has full discretion in selecting the television and radio representatives." H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 891 (1981).

A provision which was proposed but rejected at that time would have permitted public radio and television stations to submit a list of qualified individuals to the Board, which would then submit the list to the President within 45 days. One purpose was "to provide for the expeditious appointment of individuals to fill Board vacancies. Too often in the past, the President has neglected to fill openings on the Board -- to the detriment of the Board's ability to carry out its work." H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 19 (1981). See also Public Telecommunications Act of 1981: Hearings on S. 720 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 1st Sess. 23 (1981). Although the proposal was not adopted, the provision does reflect a concern that the President fill vacancies promptly, and perhaps a recognition of previous shortcomings in this regard. Because many vacancies are created by death or resignation, elimination of the ability to make recess appointments would be somewhat inconsistent with a desire to have vacancies filled expeditiously.

The effect, if any, of the language change regarding the filling of vacancies would appear to be in the direction of more, not less, Presidential authority. The court in Staebler, supra, declined to read the requirement that vacancies be filled in the same manner as the original appointment as a limit on the President's power to make recess appointments. 464 F. Supp. at 588-591. See also McCalpin, supra, slip op. at 19-20. The more ambiguous language now covering vacancies in the Corporation's Board permits a similar interpretation, one which is consistent with the Constitution's demands and thereby avoids raising doubts about the constitutionality of a statutory scheme in which individuals are given substantial authority over a major federal program. McCalpin, supra, at 16.

Because we do not believe that Congress intended to restrict the President's power to make recess appointments, the central question for us is whether the members of the Board of Directors are "officers of the United States."

The ten members of the Board of Directors of the Corporation are appointed by the President, with the advice and consent of the Senate. 47 U.S.C. § 396(c)(1) (Supp. V 1981). We believe that this unrestricted power of appointment by the President is based on the Appointments Clause and that the Board members are "officers" in the constitutional sense. They exercise "significant authority pursuant to the laws of the United States . . . .", including receipt and expenditure of appropriated funds. Buckley v. Valeo, 424 U.S. 1, 126 (1976). That Congress recites that an organization is "non-governmental" or "private" does not change this analysis. 4/

4/ Letter to Mr. Richard Garon from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, June 9, 1983 (National Endowment for Democracy).

The Supreme Court's test is whether an individual exercises significant statutory authority; it is clear that the directors of the Corporation do exercise such significant statutory authority. Among other things, the Corporation's authorizing statute permits the Corporation to make contracts, fund grants, underwrite public television and radio stations, establish and maintain a national library and conduct training programs. 47 U.S.C. § 396(g)(2) (Supp. V 1981). 5/

5/ We are aware that some have argued that the board members are not officers, and that the recess appointments power is therefore not available. Memorandum for Paul A. Mutino, General Counsel, Corporation for Public Broadcasting from James L. McHugh, Jr., Steptoe and Johnson, January 19, 1981, at 2. "Thus, the sole source of Presidential power to appoint to the CPB Board is the statute itself, which does not provide for recess appointments." Id. This Office stated, in a short opinion in 1973, though, that while the directors did not appear to be officers, we still believed that the President could make recess appointments to the Corporation. Memorandum for the Hon. John W. Dean, III, Counsel to the President from Roger C. Crampton, Assistant Attorney General, Office of Legal Counsel, January 3, 1973.

Our memorandum was written prior to the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976) and does not contain any analysis of why the directors are not officers in the constitutional sense. We must depart from its conclusion that the directors are not officers, based on the intervening Buckley decision and our present understanding of the Corporation's functions. Because of the different premise from which we now begin our analysis, it is unnecessary for us to discuss the reasoning underlying the conclusion of our 1973 memorandum.

That the Board members "cannot 'be deemed officers or employees . . . by reason of such membership . . .' does not preclude LSC directors from being considered 'officers of the United States' by reason of the Constitution." McCalpin, supra, slip op. at 11-12. The court did not read the provision, nearly identical to that found in the Corporation's, 47 U.S.C. §396(d)(2), out of the statute. Rather, it viewed it as defining

> the entitlements, obligations, and liabilities of [members] under various federal statutes and regulations . . . . [D]efendants correctly contend that the phrase "employee of the United States" has no constitutional significance. It is improbable that Congress intended for one segment of a statutory clause to be defined in its constitutional sense while the remaining segment was to have only a statutory meaning. By using both the terms "officers" and "employees," it is likely that Congress was demonstrating its concern that the [statutory] rights and duties of officers or employees of the United States would not attach to [members].

Id. at 12-13. The court went on to note that the Legal Services Corporation's status as a non-governmental corporation did not preclude its directors from being officers in the constitutional sense. Id. 6/ That Congress wishes to insulate such members from political influence, which it has done by restricting the President's removal power, id. at 16, 7/ is "a check on the

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6/ While the 1981 amendment added the word "officers" to 47 U.S.C. § 396(d)(2). See n.4 and text. The addition of the word "officer" makes the language even more similar to that discussed in McCalpin.

7/ See also Memorandum for Fred F. Fielding, Counsel to the President, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, February 8, 1981 (removal of recess appointments to the Corporation).

political influence of the Executive Branch that has been frequently utilized," but does not influence whether someone is an officer. Id. 8/

Thus, we believe that members of the Corporation's Board of Directors are "officers of the United States" whose positions the President may fill using his recess appointments power.

II. Holdover Provision

We understand that the President gave the recess appointment to Mr. Hanley in order to fill the vacancy created by the expiration of the term of Mrs. Gillian Martin Sorensen. Mrs. Sorensen apparently claimed the right to serve under the holdover provision of D.C. Code §29-519(c), which has been made applicable to the Corporation by 47 U.S.C. § 396(l), to the extent consistent with that section. 9/ It has been firmly established that holdover service comes to an end when the President makes a recess appointment to the position in which an incumbent holds over. Staebler, supra; McCalpin, supra. Thus, because the President had the authority to give a recess appontment to Mr. Hanley, as we have shown above, the President's recess appointment terminated any right Mrs. Sorensen previously might have had to continue to serve as a director of the Corporation.

8/ The historical record is replete with examples of recess appointments to so-called independent agencies. See Staebler v. Carter, 464 F. Supp. 585, 587 ("at least 116" examples in recent decades). President Carter made recess appointments to the Corporation's Board in January, 1981. Memorandum for Fred Fielding, Counsel to the President from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, February 8, 1981. Other examples include recess appointments to the Legal Services Corporation, see McCalpin, supra, and to the Communications Satellite Corporation. 42 Op. Att'y Gen. 165, 165 n.2 (1962).

9/ We see no inconsistency between 47 U.S.C. § 396 and D.C. Code § 29-519(c). 49 U.S.C. § 396(c)(4) originally contained a holdover provision. That provision was omitted in a 1981 revision of § 396. It is not clear whether the omission might have been due to a determination that the D.C. Code section rendered the statutory provision unnecessary. There is some evidence in the legislative history with regard to another provision, see n.3, supra, that Congress was concerned about the speed with which the President was filling vacancies. It may be that the deletion was intended to encourage the President to fill vacancies even more quickly by eliminating the grace period available with a holdover provision.

IV. Conclusion

We believe that the President has the authority to make recess appointments to the Board of Directors of the Corporation for Public Broadcasting. We further conclude that the recess appointment of Mr. William Lee Hanley, Jr. was legally permissible, and that Mr. Hanley therefore replaced Mrs. Gillian Martin Sorensen, whose holdover status was terminated thereby.

Please let us know if we can be of further assistance.

Ralph W. Tarr
Deputy Assistant Attorney General
Office of Legal Counsel

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

RECESS APPOINTMENTS

The President is authorized to make recess appointments to fill vacancies which occurred while the Senate was in session.

The President is authorized to make recess appointments during the temporary adjournment of the Senate from July 3 to August 8, 1960.

The reconvening of the Senate on August 8, 1960, is not to be regarded as the "next Session" of the Senate within the meaning of Article II, section 2, clause 3 of the Constitution, but as the continuation of the second session of the 86th Congress. The commissions of the officers appointed during this adjournment therefore will continue until the end of that session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress.

The adjournment of the Senate on July 3, 1960, constituted the "termination of the session of the Senate" within the meaning of 5 U.S.C. 56, so that persons whose nominations were pending before the Senate on that day and who receive recess appointments during the period of adjournment are entitled to the salaries attached to their offices, provided that the other conditions of 5 U.S.C. 56 are met; and this right will not be terminated by any temporary or final adjournment of the second session of the 86th Congress.

The terminal proviso of 5 U.S.C. 56 may require that the President submit to the Senate not later than forty days after it reconvenes on August 8, 1960, the nominations of those officers who, during the recess of the Senate, received appointments to fill vacancies which existed while the Senate was in session.

JULY 14, 1960.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to comply with your oral request for my opinion on several questions relating to your power under the Constitution to make what are commonly designated as recess appointments.

On July 3, 1960, the Senate adopted Senate Concurrent Resolution 112, 86th Cong., 2d sess., which reads:

"That when the two Houses shall adjourn on Sunday, July 3, 1960, the Senate shall stand adjourned until 12 o'clock noon on Monday, August 8, 1960, and the House of Representatives shall stand adjourned until 12 o'clock noon

on Monday, August 15, 1960." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

At the same time, the Senate agreed to a resolution providing:

"* * * That notwithstanding the adjournment of the Senate under Senate Concurrent Resolution 112, as amended, and the provisions of rule XXXVIII of the Standing Rules of the Senate, the status quo of nominations now pending and not finally acted upon at the time of taking such adjournment shall be preserved." [1]

The questions now presented are, first, whether you are authorized to make appointments pursuant to Article II, section 2, clause 3 of the Constitution, during the adjournment of the Senate from July 3 to August 8, 1960, in particular whether you may appoint to vacancies, existing at the time when the Senate was in session, those persons whom you had nominated and whose nominations were pending and not finally acted upon at the time when the Senate adjourned; second, when the commissions granted pursuant to such appointments will expire; third, whether you should submit to the Senate—when it reconvenes on August 8, 1960, or at some later time—for its advice and consent, the nominations of those persons who had received appointments during the adjournment of the Senate, especially of those whose nominations were pending and not finally acted upon at the time of the adjournment on July 3, 1960; and, finally, whether and how long the persons receiving such appointments may be paid pursuant to the provisions of 5 U.S.C. 56. For the reasons set forth in detail, I conclude, first, that you have the power to make appointments during this adjournment of the Senate, and that this power extends to vacancies which existed at the time the Senate was in session and to persons whose nominations were pending but not finally acted upon when the Senate adjourned on July 3, 1960; second, that the commissions of the persons so appointed will expire at the end of the session of the Senate

[1] Rule XXXVIII of the Standing Rules of the Senate provides in pertinent part: "6. * * * if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."

following the adjournment *sine die* of the second session of the 86th Congress, presumably, the end of the first session of the 87th Congress; third, that it would be advisable to submit to the Senate, when it reconvenes at the end of the adjournment, nominations for all persons who received appointments between July 3 and August 8, 1960; and, finally, that, provided compliance is made with the provisions of 5 U.S.C. 56, any such appointee can be paid out of the Treasury for the duration of his constitutional term or until the Senate has voted not to confirm his nomination.

I.

Article II, section 2, clause 3 of the Constitution provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

It has been settled by a long and unanimous line of opinions of the Attorneys General concurred in by the courts that the President's power to make such appointments is not limited to those which "happen to occur" during the recess of the Senate but that it extends to those which "happen to exist" during that period; hence, that the President has the constitutional power to fill vacancies regardless of the time when they first arose. 1 Op. 631 (1823); 2 Op. 525 (1832); 3 Op. 673 (1841); 7 Op. 186 (1855); 10 Op. 356 (1862); 12 Op. 32 (1866); 12 Op. 455 (1868); 14 Op. 562 (1875); 15 Op. 207 (1877); 16 Op. 522 (1880); 16 Op. 538 (1880); 17 Op. 530 (1883); 18 Op. 28 (1884); 18 Op. 29 (1884); 19 Op. 261 (1889); 26 Op. 234 (1907); 30 Op. 314 (1914); 33 Op. 20, 22–23 (1921); see also *In Re Farrow*, 3 Fed. 112 (C.C.N.D. Ga., 1880), and the opinion of Mr. Justice Woods, sitting as Circuit Justice, in *In Re Yancey*, 28 Fed. 445, 450 (C.C.W.D. Tenn., 1886).

The Congress, too, recognizes the President's power to make appointments during a recess of the Senate to fill a vacancy which existed while the Senate was in session.[2] R.S. 1761, 5 U.S.C. 56, which originally prohibited the payment of appropriated funds as salary to a person who received a recess

[2] See, *e.g.*, 52 Cong. Rec. 1369–1370 (1915); 67 Cong. Rec. 262–264 (1925).

appointment if the vacancy existed while the Senate was in session implicitly assumed that the power existed, but sought to render it ineffective by prohibiting the payment of the salary to the person so appointed.[3] In 1940, however, the Congress amended R.S. 1761, 5 U.S.C. 56 (act of July 11, 1940, c. 580, 54 Stat. 751), and permitted the payment of salaries to certain classes of recess appointees even where the vacancies occurred while the Senate was in session.[4] In view of this congressional acquiescence, you have, without any doubt, the constitutional power to make recess appointments to fill any vacancies which existed while the Senate was in session.

Next, I reach the question of whether the adjournment of the Senate, pursuant to Senate Concurrent Resolution 112 of July 3, 1960, from that day to August 8, 1960, is a "recess of the Senate" within the meaning of Article II, section 2, clause 3 of the Constitution. In other words, does the word "recess" relate only to a formal termination of a session of the Senate, or does it refer as well to a temporary adjournment of the Senate, protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations? It is my opinion, which finds its support in executive as well as in legislative and judicial authority, that the latter interpretation is the correct one.

In 1921, the Attorney General ruled that the President has the power to make recess appointments during an adjournment of the Senate for four weeks. 33 Op. 20 (1921). In his opinion, the test for the determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e., whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nomina-

[3] Cf. the memorandum submitted by Senator Butler on March 16, 1925, 67 Cong. Rec. 263, 264 (1925).

[4] For an analysis of 5 U.S.C. 56, see II, *infra*. The legislative history of the 1940 amendment of 5 U.S.C. 56 does not contain any suggestion that the President lacks the power under the Constitution to make recess appointments when the vacancies existed while the Senate was in session. Cf. S. Rept. 1079, 76th Cong., 1st sess., and H. Rept. 2646, 76th Cong., 3d sess.

tions. Relying on the classic expositions of Attorneys General Wirt and Stanbery in 1 Op. 631(1823) and 12 Op. 32(1866), the Attorney General explained the purposes the President's recess appointment power is designed to serve: *viz.*, to enable the President, at a time when the advice and consent of the Senate cannot be obtained immediately, to fill those vacancies which, in the public interest, may not be left open for any protracted period. He pointed out that the existence of a vacancy is no less adverse to the public interest because it occurs after a temporary rather than after a final adjournment of a session of the Congress, and "could not bring himself to believe that the framers of the Constitution ever intended" that the President's essential power to make recess appointments could be nullified because the Senate chose to adjourn to a specified day, rather than *sine die* (33 Op. 20, 23 (1921)).

The opinion, however, relied not only on earlier opinions of the Attorneys General; it was amply supported by judicial and legislative authority. In *Gould* v. *United States*, 19 C. Cls. 593, 595 (1884), the Court of Claims had held that the President possessed the power to make recess appointments during a temporary adjournment of the Senate lasting from July 20 to November 21, 1867. The Attorney General, furthermore, relied heavily on a "most significant" report of the Senate Committee on the Judiciary, dated March 2, 1905 (S. Rept. 4389, 58th Cong., 3d sess.; 39 Cong. Rec. 3823–3824 (1905)). This report, construing the very constitutional clause here involved, interprets the term "recess" as "the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments."

The opinion therefore concluded that the adjournment of the Congress from August 24 to September 21, 1921, a period shorter than the present recess, constituted a recess

of the Senate during which the President could fill vacancies under Article II, section 2, clause 3 of the Constitution.[5]

I fully agree with the reasoning and with the conclusions reached in that opinion. Moreover, this ruling since has been buttressed by a decision of the Comptroller General, and by the judgment of the Supreme Court in an analogous field. The decision of the Comptroller General (28 Comp. Gen. 30 (1948)) arose in the following circumstances:

In 1948, during the second session of the 80th Congress, President Truman submitted to the Senate the nominations of three judges. When the Senate, on June 20, 1948, adjourned to December 31, 1948, unless sooner called back into session by the congressional leadership, it had not acted on those nominations. On June 22, 1948, the President issued recess appointments to the three judges.[6] Upon inquiry from the Director of the Administrative Office of the United States Courts as to whether these judges could be paid, the Comptroller General ruled, largely in reliance on 33 Op. A. G. 20,[7] that an extended adjournment of the Senate is a "recess" in the constitutional sense, during which the President may fill vacancies. Specifically, the Comptroller General said ((28 Comp. Gen. 30, at 34 (1948)):

"What is a 'recess' within the meaning of that provision [Art II, section 2, clause 3 of the Constitution]? Is it restricted to the interval between the final adjournment of one session of Congress and the commencement of the next succeeding session; or does it refer also to the period following an adjournment, within a session, to a specified date as here? It appears to be the accepted view—at least since an opinion of the Attorney General dated August 27, 1921, reported in 33 Op. Atty. Gen. 20—that a period such as last referred to is a recess during which an appointment properly may be made."

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[5] In its final part (33 Op. 20, 24–25 (1921)), the opinion discussed the problems presented by the adjournment of the Senate for a few days, or for a short holiday. It concluded that the outcome hinged on the practical question of whether the Senate was present to receive communications from the President and that it was largely a matter of sound Presidential discretion to determine whether or not there was a real recess making it impossible for the Senate to give its advice and consent to executive appointments.

[6] These appointments, of course, would not have been made had not the Attorney General adhered to 33 Op. 20.

[7] The Comptroller General considered that opinion of the Attorney General so important that he incorporated it in its entirety as a part of his decision.

Considering that the Comptroller General is an officer in the legislative branch, and charged with the protection of the fiscal prerogatives of the Congress, his full concurrence in the position taken by the Attorney General in 33 Op. 20 is of signal significance.

Of equal importance is the decision of the Supreme Court in the *Pocket Veto* case, 279 U.S. 655 (1929), which, in a related field, uses the same argument as the Attorney General in 33 Op. 20: *viz.*, that the Presidential powers arising in the event of an adjournment of the Congress are to be determined, not by the form of the adjournment, but by the ability of the legislature to perform its functions. Article I, section 7, clause 2 of the Constitution provides:

"If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

The issue presented in the *Pocket Veto* case, *supra*, was whether an adjournment of the Senate from July 3 to November 10, 1926, was an adjournment of the Senate "preventing" the return of a bill which had originated in that body.

The Supreme Court, in analogy to the Attorney General in 33 Op. 20, ruled that the test is not whether an adjournment is a final one terminating a session, but "whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." [8] Applying the reasoning of the *Pocket Veto* case, *supra*, to the situation at hand, it follows that you have the power to grant recess appointments during the present recess of the Senate, because that recess "prevents" it from advising and consenting to executive nominations.

The commissions issued by you pursuant to Article II, section 2, clause 3 of the Constitution expire "at the End of their [the Senate's] next session." This "End of their next Ses-

[8] 279 U.S. 655, 680 (1929). *Wright* v. *United States*, 302 U.S. 583 (1938), held that a three-day adjournment of the Senate while the House of Representatives was in session, and during which a veto message of the President was accepted by the Secretary of the Senate, did not amount to an adjournment preventing the return of the bill. For a discussion of the Pocket Veto problem, see also 40 Op. A.G. 274 (1943).

sion" is not the end of the meeting of the Senate, beginning when the Senate returns from its adjournment on August 8, 1960, but the end of the session following the final adjournment of the second session of the 86th Congress, presumably, the first session of the 87th Congress.

The adjournment of the Congress on July 3, 1960, pursuant to Senate Concurrent Resolution 112 was not *sine die.* Hence, it merely had the effect of a temporary "dispersion" of the Congress. 20 Op. A.G. 503, 507 (1892). It did not, however, terminate the second session of the 86th Congress. 5 Hinds' *Precedents of the House of Representatives,* secs. 6676, 6677; 28 Comp. Gen. 30, 33–34 (1948); *Ashley* v. *Keith Oil Corporation,* 7 F.R.D. 589 (D.C. Mass., 1947). Hence, when the Congress reconvenes in August it will not begin a new session but merely continue the session which began on January 6, 1960. *Ashley* v. *Keith Oil Corporation, supra;* 28 Comp. Gen. 121, 123–126 (1948); see also *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary,* dated November 5, 1947, 93 Cong. Rec. 10576–77. It follows that the "next session" referred to in Article II, section 2, clause 3 of the Constitution is the session following the adjournment *sine die* of the second session of the 86th Congress, i.e., either the first session of the 87th Congress or a special session called by the President following the final adjournment of the second session of the 86th Congress.[9]

This conclusion is fully supported by a ruling of the Comptroller General relating to the previously discussed recess appointments made by President Truman on June 22, 1948. After the second session of the 80th Congress had adjourned from June 20 to December 30, 1948, and a number of recess appointments had been granted, the President notified the Congress on July 15, 1948, to convene on July 26, 1948. Proclamation No. 2796, 13 F.R. 4057; 28 Comp. Gen. 121, 124 (1948). The Congress met accordingly, and

[9] A special session called by the President during a temporary adjournment of the second session of the 86th Congress would merely constitute a continuation of that session. *Ashley* v. *Keith Oil Corporation,* 7 F.R.D. 589, 591–592 (D.C. Mass., 1947) and the authorities there cited; *Memorandum of the Federal Law Section of the Library of Congress to the Senate Committee on the Judiciary,* dated November 5, 1947, 93 Cong. Rec. 10576–77 (1947); 28 Comp. Gen. 121, 125–126.

again adjourned on August 7, 1948, until December 31, 1948 (28 Comp. Gen. 121, 122). The Comptroller General ruled "that the reconvening of the 80th Congress on July 26, 1948, pursuant to the President's proclamation of July 15, 1948 * * * merely constituted a continuation of the second session" (28 Comp. Gen., at 126); hence, that "the convening of the Congress during the period July 26 to August 7, 1948 * * * was not the 'next session of the Senate' within the meaning of Article II, section 2, clause 3 of the Constitution, and that Judge Tamm's commission to office did not expire on August 7, 1948, when the second session of the 80th Congress adjourned * * *" (28 Comp. Gen., at 127).[10]

This year the Congress will reconvene, not pursuant to your call, but according to its own adjournment resolution. In these circumstances, the return of the Congress in August clearly is a continuation of the second session of the 86th Congress and not the next session, the termination of which would cause the recess appointments to expire. Barring an adjournment *sine die* of the 86th Congress and the calling of a special session, the recess commissions granted during the present recess of the Senate will terminate at the end of the first session of the 87th Congress. Officers who serve at your pleasure, of course, may be removed by you at any time.

You also have inquired whether you should submit to the Senate, when it reconvenes in August, nominations for those persons to whom you have given recess appointments during this adjournment of the Senate, although their nominations were pending but not finally acted upon at the time the Senate adjourned. This question is so intimately tied up with the pay status of the recess appointees that I shall answer it in that context.

II.

The circumstance that you have the power to make appointments during this adjournment of the Senate and that the commissions so granted—barring unforeseen cir-

[10] The Attorney General did not publish a formal opinion in connection with this incident. A press release issued by Attorney General Clark on August 11, 1948, and the files of this Department, however, indicate that he was in full agreement with that ruling.

cumstances—will last until the adjournment *sine die* of the first session of the 87th Congress, however, does not mean necessarily that your appointees can be paid out of appropriated funds.[11] The Congress has limited severely the use of such moneys for the payment of the salaries of certain classes of recess appointees.

R.S. 1761, as amended by the act of July 11, 1940, c. 580, 54 Stat. 751, 5 U.S.C. 56,[12] provides:

"No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) of this section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate."

The import of this complicated provision, briefly, is as follows: If the President makes a recess appointment to fill a vacancy which existed while the Senate was in session, the appointee may be paid prior to his confirmation by the Senate in three contingencies:

a. If the vacancy arose within thirty days prior to the termination of the session of the Senate;

b. If at the time of the termination of the session of the Senate a nomination for this office was pending before the

[11] In this opinion I shall use the term "paid" in the sense of being paid out of appropriated funds in the regular course of business, i.e., prior to confirmation by the Senate, and without recourse to the Court of Claims.

[12] Hereafter usually referred to as 5 U.S.C. 56.

Senate, except where the nominee is a person appointed during the preceding recess of the Senate; [13] or

c. If a nomination for the office was rejected by the Senate within thirty days prior to the termination of the session, except where the person who receives the recess appointment is the person whose nomination was rejected.

The terminal proviso of 5 U.S.C. 56 requires in addition that a nomination to fill a vacancy in those three contingencies must be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

The statute thus permits the payment of salaries to persons receiving recess appointments to vacancies, which existed while the Senate was in session, in three situations, all of which are predicated on "the termination of the session of the Senate." Here again, the question arises whether this term must be interpreted technically—limited to the final adjournment of a session—or whether it permits the payment of salaries to those who receive a recess appointment after a temporary adjournment of the Senate.

The Comptroller General has ruled that "the term 'termination of the session' [has] * * * been used by the Congress in the sense of *any adjournment*,[14] whether final or not, in contemplation of a recess covering a substantial period of time" (28 Comp. Gen. 30, 37). Considering that the Comptroller General is the officer primarily charged with the administration and enforcement of 5 U.S.C. 56, his interpretation of that statute is of great weight. Independent reexamination of the subject matter, moreover, causes me to concur fully in his conclusions based largely on the purposes which the act of July 11, 1940, 54 Stat. 751, amending 5 U.S.C. 56, was designed to accomplish.

Prior to the enactment of the 1940 amendment, 5 U.S.C. 56 provided that if a vacancy existed while the Senate was in session a person receiving a recess appointment to fill that vacancy could not be paid from the Treasury until he had

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[13] 36 Comp. Gen. 444 (1956) interprets clause (b), in analogy to clause (c), as if it read: If at the time of the termination of the session of the Senate a nomination for this office was pending before the Senate, except where the person who receives the recess appointment is a person appointed during the preceding recess of the Senate.

[14] Emphasis supplied.

been confirmed by the Senate. This statute caused serious hardship, especially when a vacancy occurred shortly before the Senate adjourned, or where a session terminated before the Senate had acted on nominations pending before it (H. Rept. 2646, 76th Cong., 3d sess.; see also letter from Attorney General Murphy to Senator Ashurst, dated July 14, 1939, S. Rept. 1079, 76th Cong., 1st sess., p. 2). The inability to pay recess appointees in those circumstances had the effect of either compelling the President to leave the vacancy unfilled until the next session of the Senate, or causing the appointee to undergo the financial sacrifice of having to serve, possibly for a considerable period of time, without knowing whether he could be paid (see letter of Attorney General Murphy to Senator Ashurst, *supra*).

The purpose of the 1940 amendment was "to render the existing prohibition on the payment of salaries more flexible" (H. Rept. 2646, 76th Cong., 3d sess., p. 1) and to alleviate the "serious injustice" caused by the law as it then stood (S. Rept. 1079, 76th Cong., 1st sess., p. 2). Thus, 5 U.S.C. 56, as it stands now, is a remedial statute designed to permit the immediate payment of recess appointees, provided the President complies in good faith with the statutory conditions.[15]

The "serious injustice" caused by the inability to pay a recess appointee, of course, is just as great and undesirable in the case where the appointment was made after a temporary recess of the Senate as where the commission had been granted after a final adjournment. To restrict the words "termination of the session" to a final adjournment, therefore, would be "inconsistent with the obvious purpose of the law" 28 Comp. Gen. 30, 37.

It follows that a person receiving a recess appointment during a prolonged adjournment of the Senate may be paid, if the conditions of 5 U.S.C. 56 initially have been met, i.e., if the vacancy arose within thirty days of the adjournment; or if a nomination was pending before the Senate at the time of the adjournment, except where the recess appointee has served under an earlier recess appointment; [16] or if the Senate

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[15] For that reason, the Comptroller General consistently has interpreted the statute liberally; see, *e.g.*, 28 Comp. Gen. 30, 36–37; 238, 240–241; 36 Comp. Gen. 444, 446.

[16] Cf. fn. 13, *supra*.

had rejected a nomination within thirty days prior to its adjournment, except where the recess appointee is the person whose nomination had been rejected.

The recess appointee's right to be paid will continue throughout the constitutional term of his office, except for two contingencies: First, if the Senate should vote not to confirm him, section 204 of the annual General Government Matters Appropriation Act (Cf. July 8, 1959, 73 Stat. 166) would preclude the further payment of salary out of appropriated funds; second, the appointee's pay status may be cut off as the result of noncompliance with the terminal proviso of 5 U.S.C. 56, i.e., in the case of a failure to submit to the Senate a nomination to fill the vacancy within forty days after "the commencement of the next succeeding session of the Senate." The adjournment of the Senate after it reconvenes in August, however, will not jeopardize the recess appointee's right to be paid.[17]

III.

When the Senate reconvenes in August 1960, you should submit to it nominations for all persons who received appointments during the adjournment of the Senate, including those whose nominations were pending but not finally acted upon when the Congress adjourned. This resubmission is desirable in order to advise the Senate of the fact that recess appointments have been made, and is probably required in order to protect the pay status of the recess appointees.

Ordinarily, when the Senate adjourns for more than thirty days all nominations pending and not finally acted upon at the time of the adjournment are returned to the President and may not be considered again unless resubmitted by the President (Rule XXXVIII(6) of the Standing Rules of the Senate). However, when the Senate adjourned on July 3, 1960, it resolved that—

"* * * the status quo of nominations now pending and not finally acted upon at the time of * * * adjournment shall be preserved." (106 Cong. Rec. (Daily Ed., July 5, 1960), p. 14690.)

[17] These two points will be discussed in Part III, *infra*.

The Senate thus has waived Rule XXXVIII(6), with the result that nominations pending before it on July 3, 1960, but not finally acted upon at that time, will not be returned to you. And, when the Senate reconvenes in August, those nominations will be before it, and may be considered in the stage in which they were at the time of adjournment. The resolution thus avoids much duplication of effort, especially in those instances where hearings already have been held on a nomination.

I do not read the resolution, in particular the statement that the *status quo* of all pending nominations not finally acted upon shall be preserved, as purporting to freeze those nominations, and to prevent the President from giving recess appointments to those whose nominations were pending but not finally acted upon at the time of the adjournment of the Senate. Any attempt of the Senate to curtail the President's constitutional power to make recess appointments would raise the most serious constitutional questions. And where, as here, the resolution not only fails to reveal any such purpose, but rather obviously was designed to obviate needless work, I refuse to attribute to the Senate any intent to interfere with the President's constitutional powers and responsibilities.[18]

In spite of the suspension of Rule XXXVIII(6) of the Standing Rules of the Senate, I recommend strongly that when the Senate reconvenes in August you should submit to it new nominations for those persons whose nominations were pending on July 3, 1960, and who have received appointments during the adjournment of the Senate. The submission of the new nominations would not constitute a

[18] The circumstance that the nominations remain pending before the Senate during its recess does not affect the pay status of the recess appointees. 5 U.S.C. 56 does not contain any prohibition against the payment of the salaries to appointees whose nominations are pending before the Senate after its adjournment. Clause (b), it is true, refers to the situation that a nomination *is pending* before the Senate at the time of the termination of the session of the Senate. There is, however, nothing in the spirit and the language of 5 U.S.C. 56 to the effect that clause (b) is inapplicable where this nomination *remains pending* following the termination of the session. Moreover, 5 U.S.C. 56 has been interpreted to the effect that the question of whether a person may be paid is to be determined as of the time of the adjournment of the Senate preceding the recess appointment and not as of a later time (28 Comp. Gen. 121, 127–129, and see the discussion of that part of the Comptroller General's ruling, *infra*).

meaningless duplication of effort, nor jeopardize the pay status of the recess appointees. The failure to do so, however, may constitute a violation of the terminal proviso of 5 U.S.C. 56 and delay, if not entirely prevent, the payment of salaries to the appointees.

First. Nominations submitted to the Senate customarily indicate the circumstance, where applicable, that a nominee is serving under a recess appointment. The preadjournment nominations of those who thereafter received recess appointments, of course, do not contain that information. The Senate has a substantial interest in being advised of the fact that a nominee is serving under such an appointment. Such appointment fills the position temporarily, and confirmation therefore is no longer urgent. This may be an important consideration to the Senate when it returns for what is hoped to be a short session. On the other hand, if the Senate is strongly opposed to an appointee it may vote to deny confirmation, and thus, for all practical purposes force him to resign by cutting off his pay. The submission of a new nomination for a recess appointee after the return of the Senate, accordingly, serves a distinct purpose.

Second. The terminal proviso of 5 U.S.C. 56 requires the submission of the nomination of a person who received a recess appointment "to the Senate not later than forty days after the commencement of the next succeeding session of the Senate." Failure to comply with this proviso presumably results in the suspension of the appointee's right to be paid out of appropriated funds. While the reconvening of the Senate after a temporary adjournment is not the commencement of the next session of the Senate in the ordinary sense of that term, we have seen that 5 U.S.C. 56 uses those words in a nontechnical way. If the words "termination of a session" in clauses (a), (b), and (c) have been interpreted as including a temporary adjournment which does not terminate a session, it is likely that the words "commencement of the next succeeding session of the Senate" correspondingly refer to the reconvening of the Senate after any adjournment, regardless of whether, technically, it begins a new session. In these circumstances, prudence suggests that I base my advice on the assumption that 5 U.S.C. 56 may require

the submission of new nominations when the Senate reconvenes in August.[19]

I do not believe that noncompliance with the terminal proviso of 5 U.S.C. 56 can be rested safely on the ground that nominations made prior to adjournment but not finally acted upon at that time are still pending before the Senate as the result of the suspension of Senate Rule XXXVIII(6). The statute does not contain an exception covering that contingency.[20] It could be argued, of course, that a statute should not be construed so as to require the performance of a redundant ceremony. However, as we have shown, the information that a nominee is serving under a recess appointment may be of considerable interest to the Senate. In any event, I should hesitate to recommend for quasi-equitable reasons the omission of an express statutory requirement in an area as technical as the appointment and pay of Federal officers.

In weighing these conflicting considerations, it appears to me, on the one hand, that the submission of new nominations to the Senate does not constitute an intolerably heavy burden. Moreover, as I shall show presently, rulings of the Comptroller General—with which I fully agree—have established that compliance with the letter of the statute will not jeopardize the recess appointee's pay status. On the other hand, the failure to resubmit a nomination conceivably may result in the suspension of the appointee's pay. In these circumstances, I recommend that when the Senate reconvenes in August nominations should be submitted for all officials who received appointments during the adjournment of the Senate, including those whose nominations were pend-

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[19] Arguments, of course, can be made that the words "commencement of the next succeeding session of the Senate" should be given their traditional meaning. The circumstance that the terminal proviso gives the President forty days within which to submit the nomination to the Senate might support the conclusion that the proviso refers to the next regular session of the Senate because, as a matter of experience, adjourned sessions of the Senate rarely last forty days. If the Senate should adjourn within forty days after its return on August 8, 1960, and before the President has submitted the nomination, it could be argued, in analogy to Article I, section 7, clause 2 of the Constitution, that compliance with 5 U.S.C. 56 has been waived because it has been "prevented" by the adjournment of the Senate.

[20] The terminal proviso to 5 U.S.C. 56 was inserted by the Senate Committee on the Judiciary in order to insure that the nomination "will be submitted in ample time for adequate consideration by any incoming session of the Senate." S. Rept. 1079, 76th Cong., 1st sess., p. 2.

ing before the Senate at the time of its adjournment on July 3, 1960.[21] As a matter of precaution, I urge that nominations be submitted again when the Senate commences a new session in the technical sense.

The recess appointees' pay status will not come to an end when the Senate adjourns after its August sitting. When the Senate concludes its session after reconvening in August, a situation will be presented which appears to fall within the exception to 5 U.S.C. 56, clause (b) : The Senate then will have terminated a session, and at that time there will be pending before it the nomination of a person who had received an appointment during the preceding recess of the Senate. This raises the question of whether the pay rights of a recess appointee, whose appointment originally complied with the requirements of 5 U.S.C. 56, can be cut off by the circumstances existing at the time of the subsequent termination of a session of the Senate. The opinion of the Comptroller General in 28 Comp. Gen. 121 cogently demonstrates that this is not the case because the words "termination of the session of the Senate" in 5 U.S.C. 56 uniformly refer to the session immediately preceding the recess when the appointment was made, and not to any subsequent termination.

An analysis of 5 U.S.C. 56 shows that in clauses (a) and (c) the words "termination of the session of the Senate" unquestionably relate to the session immediately preceding the recess of the Senate during which the appointment was made and not to a later one. The Comptroller General inferred from this that "it would be wholly inconsistent to say that the phrase 'termination of the session' as used therein [clause (b)] had reference to other than the session preceding the recess when the appointment was made.[22] * * * In other words, the entire statute speaks as of the date of the recess appointment under which the claim to compensa-

[21] Considering that it is desirable to obtain the advice and consent of the Senate to a nomination at the earliest possible moment, my recommendation includes the submission of nominations for those who received recess appointments to vacancies which occurred after the adjournment of the Senate, although 5 U.S.C. 56 does not cover those appointments.

[22] The Comptroller General also explained that the statute uses the words "termination of *the* session" in the specific sense, hence, that it refers to the termination of a particular session, i.e., the one preceding the recess appointment "rather than to just any session" 28 Comp. Gen. 121, 128.

tion arises." (28 Comp. Gen. 121, 128 (1948)). The Comptroller General, therefore, concluded that the right to compensation, once vested, does not become defeated by a subsequent adjournment. He realized that under his interpretation the words "termination of the session of the Senate" in 5 U.S.C. 56 refer to a different session than the words "End of their next Session" in Article II, section 2, clause 3 of the Constitution. He attributed this "apparent inconsistency" to the circumstance that the recess appointment provisions of the Constitution and of 5 U.S.C. 56 serve different purposes (28 Comp. Gen. 121, 129).

I fully agree with the conclusions of the Comptroller General reached on the basis of the statutory language. I believe, however, that this result may be supported by two additional, broader considerations. First, the purpose of the 1940 act amending 5 U.S.C. 56 was to eliminate the hardship and injustice resulting from the inability to pay recess appointees appointed to vacancies which existed while the Senate was in session, where the vacancies arose shortly before an adjournment of the Senate, or where a nomination was pending before the Senate, but where the Senate adjourned before acting on it. The purpose of the 1940 statute was to permit the payment of salaries out of appropriated funds in those cases. It would create a new instance of the very hardship which the statute was intended to alleviate, if the right to compensation, once accrued, could be cut off by subsequent events, such as the reconvening and subsequent adjournment of the Senate, and if a recess appointee thereafter were required to work without pay for the rest of his constitutional term, or until the Senate should confirm him. An interpretation of the statute, which gives rise to results so inconsistent with the purposes it is designed to serve, must be rejected.

Second, it is the basic policy of the United States that a person shall not work gratuitously for the Government, or be paid for such work by anyone other than the Government (31 U.S.C. 665(b); 18 U.S.C. 1914). It is well recognized that a person who is not paid cannot be expected to perform his work zealously, and that he may be subjected to a host of corrupting influences. A statute which provides that a person cannot be paid by the Treasury until the happening

of a future event, therefore, must be strictly construed. Even less favored is an interpretation which would result in the defeasance of a right to be paid, once it has accrued. In the case of any ambiguity, a statute should be read so as to permit the current compensation for work performed for the United States.

I therefore conclude that an adjournment of the Senate during, or terminating, the second session of the 86th Congress will not affect the pay status of a person appointed during the current recess of the Senate, and whose appointment originally complied with the requirements of 5 U.S.C. 56.[23]

Respectfully,

LAWRENCE E. WALSH,
Acting Attorney General.

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[23] A final caveat: A recess appointee filling a vacancy which existed while the Senate was in session, and who is not confirmed, when the Senate adjourns after it reconvenes in August, may not be given, out of a superabundance of caution, a second recess appointment. Such second appointment is unnecessary because his term runs until the end of the first session following the final adjournment of the second session of the 86th Congress; moreover, it might bring the appointee within the exception to 5 U.S.C. 56, clause (b) and, conceivably, result in the suspension of his salary. Cf. 28 Comp. Gen. 30, 37–38.

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retirement, and since there is included in such average pay the pay he received as a commissioned officer during a portion of such six months' period, it is apparent that his retired pay is being received "for or on account of services as a commissioned officer," especially when it is considered that approximately 60 percent of his retired pay is received solely by reason of the inclusion of the pay of his commissioned rank. It is solely by reason of his commissioned service that a substantial portion of his retired pay is computed on the basis of the pay prescribed by law for the commissioned rank held by him during a portion of the 6-month period preceding his retirement. See 26 Comp. Gen. 271. While it might be contended that only the *difference* between the retired pay he would have received as an enlisted man and the retired pay he is receiving by reason of the inclusion of commissioned service actually represents retired pay received for or on account of commissioned service, the law governing the computation of his retired pay authorizes no alternative basis for computing retired pay under such circumstances. *Cf.* 26 Comp. Gen. 711. That is to say, the act of June 30, 1941, authorizes the computation of retired pay on the basis of the average pay the enlisted man received for six months prior to retirement, and there would be no authority for excluding from such 6-month average computation the period during which the enlisted man served as a commissioned officer, or for any assumption that the enlisted man would have served in any particular enlisted grade during the entire 6-month period but for the fact that he served as a commissioned officer. *Cf.* 27 Comp. Gen. 129, 134. Hence, it must be held that Master Sergeant Matheson is in receipt of retired pay "for or on account of services as a commissioned officer" within the meaning of that phrase as used in section 212, *supra*, and since his retired pay is less than $3,000 per annum, and his civilian compensation is in excess of $3,000 per annum, the concurrent payment of retired pay and civilian compensation is not authorized.

Accordingly, payment on the voucher, which is retained in this Office, is not authorized.

[B-77963]

Appointments—Recess Appointments

The reconvening of the Senate of the 80th Congress on July 26, 1948, pursuant to Presidential proclamation, and its subsequent adjournment on August 7, 1948, until December 31, 1948, is to be regarded merely as a continuation of the second session of the 80th Congress, and not as constituting the "next Session" of the Senate within the meaning of Article II, section 2, clause 3, of the Constitution, so that commissions of persons holding recess appointments as Federal judges

made prior to July 26, 1948, may not be considered as having expired on August 7, 1948.

Persons serving under valid recess appointments as Federal judges when the Senate had reconvened in the same session, and whose nominations were pending before the Senate at the time that body again recessed to a definite date may continue to receive the salary attached to the offices, provided they continue to serve under their original recess appointments so as to render inapplicable the prohibition in section 1761, Revised Statutes, as amended, against payment of compensation to persons appointed during the recess of the Senate who had received appointments during a preceding recess and whose nominations were pending at the time the second recess appointment was made.

Comptroller General Warren to the Director, Administrative Office of the United States Courts, August 26, 1948:

I have letter of August 10, 1948, from the Assistant Director, referring to the decision of this Office dated July 16, 1948, to you, B-77963, 28 Comp. Gen. 30, and presenting a further question concerning the right to payment of salary of Honorable Edward Allen Tamm, Honorable Samuel Hamilton Kaufman, and the Honorable Paul P. Rao, all of whom received recess appointments to the Federal judiciary from the President during the recess of the Congress which occurred June 20 to July 26, 1948.

It is stated in the aforesaid letter that the names of these three judges were again submitted to the Senate for confirmation on July 29, 1948, after it had reconvened on July 26, 1948, pursuant to the President's proclamation (Proc. No. 2796, 13 F. R. 4057); that the Senate took no action on these nominations, and that they were still pending when it adjourned on August 7, 1948, pursuant to House Concurrent Resolution No. 222, reading as follows:

Resolved by the House of Representatives (the Senate concurring), That when the two Houses adjourn on Saturday, August 7, 1948, they stand adjourned until 12 o'clock meridian on Friday, December 31, 1948, or until 12 o'clock meridian on the third day after the respective Members are notified to reassemble in accordance with section 2 of this resolution, whichever event first occurs.

SEC. 2. The President pro tempore of the Senate, the Speaker of the House of Representatives, the acting majority leader of the Senate, and the majority leader of the House of Representatives, all acting jointly, shall notify the Members of the Senate and the House, respectively, to reassemble whenever, in their opinion, the public interest shall warrant it.

It is indicated in the letter that, in accordance with the aforementioned decision of July 16, 1948, the three judges received payment of salary in due course after the assumption of office under their recess appointments. A decision now is requested as to whether the occurrence of the facts, as set forth above, subsequent to the rendition of the cited decision, requires the suspension of payment of their salaries.

In addition to the above stated facts, it is understood that Judges Tamm, Kaufman, and Rao have not been given interim appointments since the adjournment of the Congress on August 7, 1948, pursuant to the resolution above quoted.

In considering the question presented, it is deemed appropriate to advert briefly to the facts and the holding in the decision of July 16, 1948. Since the relevant circumstances in the case of each of the judges involved do not differ in any material respects, the present matter will be considered, for the purpose of simplification, upon the basis of the facts in Judge Tamm's case. The nomination of Judge Tamm was sent to the Senate on February 3, 1948. The Senate, without acting on the nominations, adjourned pursuant to House Concurrent Resolution 218, on June 20, 1948, to a specified date, namely, Friday, December 31, 1948, unless notified to reassemble at an earlier date by call of its officers. On June 22, 1948, Judge Tamm was given a recess appointment by the President to the office he now holds and, on June 28, 1948, he took the oath of office and entered on duty. Upon the basis of these facts, there was presented for consideration the question as to whether payment of salary could be made in view of the provisions of section 1761, Revised Statutes, as amended, 5 U. S. C. 56, which are as follows:

> No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) of the section, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

In the decision of July 16, 1948, it was held that the adjournment of the Senate on June 20, was a "termination of the session" within the meaning of clause (b) of section 1761, Revised Statutes, *supra*, and that Judge Tamm, having been previously nominated during that session, and his nomination having been pending in the Senate when it adjourned on June 20, was entitled to be paid the salary of the office under his appointment of June 22, 1948.

As pointed out in your letter, since the foregoing decision of July 16, 1948, was rendered, the Senate reconvened on July 26, pursuant to the call of the President; Judge Tamm's nomination was again submitted to the Senate on July 29; and on August 7, the Senate adjourned until December 31, 1948. What effect then, if any, do the recent meeting of the Senate and the ensuing recess have upon the right of Judge Tamm to continue to receive the salary of his office?

As was indicated in the decision of July 16, 1948, the appointment of Judge Tamm on June 22, 1948, appears to have been a valid recess

appointment by the President under Article II, section 2, clause 3, of the Constitution which provides as follows:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Hence, there would appear to be for consideration first the question as to whether the convening of the Congress on July 26, 1948, and its subsequent adjournment on August 7, 1948, constituted the next session of the Senate within the meaning of the said article of the Constitution and that, as a consequence, Judge Tamm's commission expired on the latter date. If the answer to the said question be in the affirmative, it would seem to follow that the payment of the salary to Judge Tamm beyond August 7 properly may not be made. However, in view of the matters hereinafter set forth, I have no doubt but that the answer to the said question must be in the negative. In the decision of July 16, 1948, it was pointed out that the adjournment of the Congress on June 20, 1948, pursuant to House Concurrent Resolution No. 218 was not an adjournment *sine die* but was an adjournment to a specific date, and it was stated that said adjournment merely constituted a recess of the second session of the 80th Congress. The said resolution No. 218 reads as follows:

> *Resolved*, That when the two Houses adjourned on Sunday, June 20, 1948, they stand adjourned until 12 o'clock meridian on Friday, December 31, 1948, or until 12 o'clock meridian on the third day after the respective Members are notified to reassemble in accordance with section 2 of the resolution, whichever event first occurs.
>
> SEC. 2. The President pro tempore of the Senate, the Speaker of the House of Representatives, the acting majority leader of the Senate, and the majority leader of the House of Representatives, all acting jointly, shall notify the Members of the Senate and the House respectively, to reassemble whenever, in their opinion, the public interest shall warrant it.

The correctness of the referred-to statement is substantiated by the facts hereinafter set forth.

First, it will be observed that the Proclamation of the President (Proc. No. 2796, 13 F. R. 4057) notifying the Congress to assemble on July 26, 1948, speaks merely of a convening of such body and does not refer to the meeting as an "extra" or "special" session.

Said proclamation reads, in part, as follows:

> Whereas the public interest requires that the Congress of the United States should be convened at twelve o'clock, noon, on Monday, the twenty-sixth day of July, 1948, to receive such communication as may be made by the Executive; NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim and declare that an extraordinary occasion requires the Congress of the United States to convene at the Capitol in the City of Washington on Monday, the twenty-sixth day of July, 1948, at twelve o'clock, noon, of which all persons who shall at that time be entitled to act as members thereof are hereby required to take notice.

To this point, the instant situation is identical, in all material respects, to that which existed in connection with the adjournment of the first

session of the 80th Congress on July 27, 1947, by Senate Concurrent Resolution No. 33, and its reconvening on November 17, 1947, pursuant to Proclamation No. 2751, issued by the President on October 23, 1947. 12 F. R. 6941. The said adjournment of the first session of the 80th Congress and its subsequent reconvening on November 17, 1947, was the subject of an opinion by Judge Wyzanski of the United States District Court, District of Massachusetts, rendered on November 18, 1947 in the case of *Ashley* v. *Keith Oil Corporation, et al.*, 7 F. R. D. 589. The question there involved was the effective date of certain amendments to the Federal Rules of Civil Procedure which were to take effect "three months subsequent to the adjournment of the first regular session of the 80th Congress." The remarks of Judge Wyzanski are believed to be so pertinent to the present situation that I feel they should be quoted herein at length.

The opinion reads in part as follows (pages 590–592):

> The first regular session began January 3, 1947. That session could be brought to a close in at least two ways: First, by a concurrent resolution of the two Houses of Congress adjourning the session sine die; second, by the beginning of a new session either under an Act of Congress or under that clause of Section 2 of the Twentieth Amendment to the United States Constitution which provides that a new "meeting shall begin at noon on the 3rd day of January [in every year] unless they [Congress] shall by law appoint a different day."
>
> Neither of those two methods of adjourning the first session of Congress has as yet become operative.
>
> Congress has not as yet passed a resolution to adjourn the first session sine die. It is true that when the 80th Congress was in session last summer it passed Concurrent Resolution No. 33 set out in the margin, providing that Congress should adjourn from July 27, 1947 until January 2, 1948, unless notified to reassemble under provisions not now material. But that resolution was a mere temporary adjournment. It was the form of resolution customarily used for a recess. See § 949 of the Rules of the House of Representatives, House Document #810, 78th Congress, 2d Sess. It resembled Senate Resolution of July 8, 1943, adopted by the 78th Congress, First Session, Congressional Record, 78th Cong., 1st Sess. 7471, under which Congress separated and reassembled without ending an old session or beginning a new session. Cf. 57 Stat. 568; Congressional Record, 78th Cong., 1st Sess., 7519. Thus it cannot properly be said that the 80th Congress by Concurrent Resolution No. 33 or by any other measure closed the first session sine die as of July 27, 1947.
>
> Nor has the first session of the 80th Congress been closed as yet by the beginning of a new session under either an Act of Congress or the Twentieth Amendment. The only relevant law passed by the Eightieth Congress is Senate Joint Resolution No. 156, which states that "the second session of the Eightieth Congress shall begin at noon Tuesday, January 6, 1948." Congressional Record, 80th Cong., 1st Sess. 10643. That act would only operate to terminate the first session as of 11:59 a. m. January 6, 1948. And this date is not in any way advanced by the Twentieth Amendment which sets the date as January 3 only if there is no law appointing a different day.
>
> So far my reasoning appears to be entirely in accord with that of the Parliamentarian of the House of Representatives, the Secretary of the Senate and the Director of the Administrative Office of the United States Courts, Annual Report of the Director, September 1947, pp. 26, 27, although it seems contrary to the ruling of Judge Reeves in Shafir v. Wabash R. Co., D. C. W. D. Mo., 1 F. R. D. 467.
>
> But there remains the difficult problem as to whether the first session of the 80th Congress has already been brought to a close not by concurrent resolution, by act of Congress or by the Twentieth Amendment, but by the action of Congress in reconvening on November 17 pursuant to the Proclamation of President Truman issued on October 23, 1947, No. 2751. 12 Fed. Reg. No. 210; Oct. 25, 1947.

Article II, § 3, of the United States Constitution provides that the President "may on extraordinary occasions, convene both Houses, or either of them." This is language of unusual breadth. It is not limited to the situation where a particular Congress has never met in session, or where a Congress has met and adjourned sine die. It also covers the situation where Congress or either House is not meeting because it is in recess under a temporary adjournment.

If the President convenes a Congress that has never met, of course, he is convening it in a new session, which is called in the proclamation an "extra" session. See e. g. Proclamation of President Hoover, March 7, 1929, 46 Stat. 2981. If the President convenes a Congress that has met but adjourned sine die, he is likewise convening it in a new session, which is called an "extra" session. See e. g. Proclamation of President Roosevelt, Sept. 13, 1939, No. 2365, 54 Stat. 2660. But in the case at bar we are faced with a situation where when the President issued his proclamation Congress had met and adjourned only temporarily. Is the reconvening of Congress pursuant to the President's call automatically the beginning of a new session and the close of an old session? Jefferson evidently thought it would be. § 51 of his Manual states that if Congress is "convened by the President's Proclamation, this must begin a new session, and of course determine the preceding one to have been a session." This manual is, of course, entitled to great weight because since 1837 it has been, by virtue of a still effective rule of the House of Representatives, governing authority in that House in all cases where there is no conflict with the standing rules and orders of that House. House Rule 43, House Document #810, 78th Congress, 2d Sess. See Congressional Record, 80th Cong., 1st Sess., 36.

On the other hand, the present Parliamentarian of the House and Secretary of Senate have considered the reassembling of the Congress on November 17, 1947, as a continuation of the first session. In their judgment no extra or special session has begun. And their view is finding expression every day in the pagination of the Congressional Record and in like official Congressional documents. Congress so far has apparently acquiesced in this action of its delegates; though the matter does not appear to have been debated.

Moreover, the view of these officers of Congress is not in conflict with any specific language of President Truman's Proclamation. Unlike the Proclamations of Presidents Hoover and Roosevelt already cited, the Proclamation of President Truman dated October 23, 1947, does not refer to an "extra" session which will result from the convening of Congress pursuant to the President's call.

It is unnecessary for me in the case at bar to decide which of these conflicting views is correct. Even if Jefferson's manual is correct, the new amendment to the Rules cannot go into effect prior to February 17, 1948. It is quite possible that before then Congress by legislative action will conclusively remove any ambiguity as to the proper numerical description of its present session, or will more explicitly provide a date when the new amendments to the rules shall go into effect.

Thereafter, the first session of the 80th Congress adjourned *sine die* on December 19, 1947, thus evidencing the correctness of the aforesaid views of Judge Wyzanski that the adjournment of the Congress on July 27, 1947, pursuant to Senate Concurrent Resolution No. 33, constituted a recess and that the reconvening of the Congress on November 17, 1947, pursuant to the proclamation of the President issued on October 23, 1947, was a continuation of the first session and not a new session.

In the light of the foregoing, it seems clear that the reconvening of the 80th Congress on July 26, 1948, pursuant to the President's proclamation of July 15, 1948 (Proc. No. 2796, quoted above), merely constituted a continuation of the second session.

Furthermore, and of greater significance, is the fact that the Congress itself considers the proceedings between July 26 and August 7, 1948, to be a continuation of those of the second session which had ad-

journed on July 20, 1948. In such connection, the calendars of both the House of Representatives and the Senate covering the proceedings between July 26 and August 7 show that the business thereof was that of the second session of the 80th Congress. Also, the Congressional Record for the period involved refers to the matters contained therein as the proceedings and debates of the 80th Congress, second session. In addition, it is understood that the Journals of the Congress show the proceedings of the period as being those of the second session of the 80th Congress.

Finally, it will be observed from House Concurrent Resolution No. 222, quoted above, that, on August 7, 1948, the Congress adjourned until December 31, 1948, or until the third day after the respective Members were notified to reassemble in accordance with section 2 of said resolution; that is, by the leaders of the majority party.

In my opinion, the foregoing demonstrates conclusively that the convening of the Congress during the period July 26 to August 7, 1948—subsequent to Judge Tamm's appointment—was not the "next Session" of the Senate within the meaning of Article II, section 2, clause 3, of the Constitution, and that Judge Tamm's commission to office did not expire on August 7, 1948, when the second session of the 80th Congress adjourned pursuant to House Concurrent Resolution No. 222, *supra*. It follows, therefore, that the payment of salary to Judge Tamm properly may be made after said date unless such payment may be said to be prohibited by the provisions of section 1761, Revised Statutes, as amended, *supra*.

As hereinbefore stated, it was held in Office decision of July 16, 1948, that Judge Tamm was entitled to the payment of salary under his recess appointment of June 22, 1948, by virtue of the provisions of clause (b) of section 1761 of the Revised Statutes, as amended, since his nomination was pending in the Senate when it adjourned on June 20, 1948. While clause (b) is, in itself, an exception to the salary payment prohibition of the original statute, it will be noted that there is contained in the said clause what is, in effect, an exception to the exception. That is to say, the clause permits salary payments to recess appointees whose naminations were pending upon the termination of the session of the Senate, *provided* the appointee had not received a recess appointment during the preceding recess of the Senate. Under the reasoning of the decision of July 16—holding that the adjournment of the Congress on June 20, to December 31, 1948, pursuant to House Concurrent Resolution 218, was a "termination of the session" within the meaning of section 1761, Revised Statutes, as amended—it must be considered that the adjournment on August 7, to December 31, 1948, likewise constitutes a "termination of the session" to that extent. And, since there was another nomination of Judge Tamm

to office pending in the Senate on August 7, the real question is whether the present case falls within the class of those specifically excluded from the exemption provided by clause (b).

In fact, the issue can be further simplified. As illustrated above, there are now involved not one but two terminations of Senate sessions within the meaning of the subject statute—that of June 20 and that of August 7. The decision here would appear to turn upon whether the phrase "termination of the session" in clause (b) should be regarded as having reference to the first or the second adjournment date. If it refers to the earlier date only the conclusion of the decision of July 16 still obtains; if, however, the term now must be held to refer to the later date, Judge Tamm is specifically excluded from the exemption provided generally by clause (b) since he would be a person who, though having a nomination pending at the termination of the session (August 7), would have been appointed "during the preceding recess."

As stated above, the prohibition in section 1761, Revised Statutes, is against the payment of salary to a recess appointee if the vacancy to which he is appointed "existed while the Senate was in session." There can be no question that the "session" of the Senate in contemplation there is the session immediately preceding the recess during which the appointment was made. Clause (a), as added by the 1940 amendment, is to the effect that the prohibition shall not apply if the vacancy arose within 30 days "prior to the termination of the session of the Senate." The same conclusion must be reached with respect to the "session" referred to in this exception. That is, it likewise must be the session immediately preceding the recess during which the appointment was made. So that, coming to clause (b), it would be wholly inconsistent to say that the phrase "termination of the session" as used therein had reference to other than the session preceding the recess when the appointment was made. Clause (c) is the same. In other words, the entire statute speaks as of the date of the recess appointment under which the claim to compensation arises.

This position is further supported by the general rule that, in a statute, the article "the" is to be construed as having a specifying or particularizing effect, opposed to the indefinite or generalizing force of "a" or "any." Thus, the language "termination of the session" ordinarily would be viewed as having reference to a particular session rather than to just any session. Here, the session preceding the recess when the appointment is made would be the one most naturally contemplated by the language.

In this view of the statute, it must be concluded that the right of Judge Tamm to compensation under his recess appointment of June 22, 1948, to which he became entitled under clause (b) of section 1761,

Revised Statutes, as amended, has not been divested or otherwise affected by the events occurring subsequent to such appointment and vesting of right. In other words, the subsequent occurring events have not had the effect of placing Judge Tamm in the position of a person appointed during the recess of the Senate who had received an appointment during a preceding recess of the Senate and whose nomination was pending before the Senate at the time the second recess appointment was made. The same principles apply, of course, to others in like status.

It might be stated that I am not unaware of certain corollaries of this decision which at first blush might seem incongruous but which, upon thorough consideration, have been deemed of less than controlling importance. In the first place, the Constitution (Article II, section 2, clause 3) provides that recess appointments shall expire at the end of the next session of the Senate. It has been stated above that the adjournment of August 7 would have to be regarded as a "termination of the session" within the meaning of the compensation statute, and yet, in applying the said Constitutional provision the adjournment of August 7 would have to be regarded merely as effecting a recess of the second session of the 80th Congress. Suffice it to say that this apparent inconsistency is attributable solely to a construction of the compensation statute designed to carry out the obvious legislative intent.

Then, there is the rather anomalous situation in that, should Judge Tamm—or others in like position—receive a new recess appointment he would be precluded from receiving compensation under such appointment for the same reasons that required the conclusion in the decision of July 16 that Judge Harper could not be paid under his subsequent recess appointment. The answer here is that new recess appointments are not necessary so long as the original appointment remains valid under the provisions of the Constitution. But once a new appointment is given, the prohibitory language in clause (b) of section 1761, Revised Statutes, operates to preclude the payment of salary to the appointee.

Your submission is answered accordingly.

[B-79103]

Compensation—Postal Service—Automatic Promotions—Service Credits

Under section 1 of the act of June 19, 1948, authorizing, in the case of Postal Service employees transferred from positions for which automatic promotions

August 3, 1979

79-57 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503)

We are responding to your inquiry whether the President can make appointments under Article II, Section 2, Clause 3 of the Constitution[1] during the forthcoming recess of the Senate, that is expected to last from about August 2 until September 4, 1979. It is our opinion that the President has this power.

A preliminary question is whether the President's authority to make appointments under this clause, commonly called "recess appointments," applies to all vacancies that exist during a recess of the Senate or whether it is limited to those vacancies that arise during the recess. A long line of opinions of the Attorneys General, going back to 1823 (*see* 41 Op. Att'y Gen. 463, 465 (1960)), and which have been judicially approved (*see, Allocco* v. *United States*, 305 F.(2d) 704 (2d Cir. 1962)), has firmly established that the words "may happen" is to be read as meaning, "may happen to exist during the recess of the Senate," rather than as, "may happen to occur during the recess of the Senate." The President's power to make recess appointments thus is not limited to those vacancies that occurred after the Senate went into recess, but extends to all vacancies existing during the recess regardless of the time when they arose. It should be noted, however, that where a vacancy existed while the senate was in session, the recipient of the recess appointment may be paid for his services only if the conditions of 5 U.S.C. § 5503 have been met. We discuss this matter in more detail later in this opinion.

[1]Article II, § 2, cl. 3, provides:

"The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The question whether an intrasession recess of the Senate constitutes a recess within the meaning of Article II, Section 2, Clause 3, of the Constitution has a checkered background. Attorney General Knox ruled in 1901 that an adjournment of the Senate during the Christmas holidays, lasting from December 19, 1901, to January 6, 1902, was not a recess during which the President could make recess appointments. 23 Op. Att'y. Gen. 599 (1901). That interpretation was overruled in 1921 by Attorney General Daugherty, who held that the President had the power to make appointments during a recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y. Gen. 20 (1921). The opinion concluded that there was no valid distinction between a recess and an adjournment, and it applied the definition of a recess as described by the Senate Judiciary Committee in its report of March 2, 1905:

> the period of time when the senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments * * * . [S. Rept. 4389, 58th Cong., 3d sess., 1905; 39 CONGRESSIONAL RECORD 3823. [(Emphasis added.)]

The Attorney General, however, closed with the warning that the term "recess" had to be given a practical construction. Hence, he suggested that no one "would for a moment contend that the Senate is not in session" in the event of an adjournment lasting only 2 days, and he did not believe that an adjournment for 5 or even 10 days constituted the recess intended by the Constitution. He admitted that by "the very nature of things the line of demarcation cannot be accurately drawn." He believed, nevertheless, that:

> the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor the validity of whatever action he may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.

This opinion was cited and quoted with approval by the Comptroller General in 28 Comp. Gen. 30, 34 (1948), and reaffirmed by Acting Attorney General Walsh in 1960 in connection with an intrasession summer recess lasting from July 3, 1960, to August 15, 1960. 41 Op. Att'y Gen. 463 (1960). Presidents frequently have made recess appointments during intrasession recesses lasting for about a month.

In the winter of 1970 the Senate recessed from December 22 to December 28, 1970, and the House adjourned from December 22 to December 29, 1970. When the Off

in the light of the warning in Attorney General Daughtery's opinion. In connection with the Pocket Veto Clause of the Constitution, Article I, Section 7, Clause 2, the President, however, decided without awaiting our advice that the 6-day adjournment of the Senate constituted an adjournment which prevented the return of a Senate bill; hence, that he could pocket veto S. 3418, The Family Practice of Medicine Act. Senator Kennedy, who had voted in favor of the bill, thereupon sought a declaratory judgment that the bill had become law without the signature of the President because the President had failed to return the bill within the 10-day period provided for in Article I, Section 7, Clause 2, and that the 6-day intrasession adjournment did not prevent the return of the bill. The D.C. Circuit Court of Appeals held that the bill had become law. That decision was based on the considerations that the 6-day adjournment had not prevented the return of the bill on account of its short duration, and that it was an intrasession adjournment and "appropriate arrangements * * * for receipt of presidential messages" had been made. *Kennedy* v. *Sampson*, 511 F.(2d) 430, 442 (C.A.D.C. 1974). The decision rests on an extrapolation of *Wright* v. *United States*, 302 U.S. 583 (1938), but is inconsistent with important passages in the *Pocket Veto Case*, 279 U.S. 655, 683–687 (1929), which considered such "appropriate arrangements for the receipt of Presidential messages" to be ineffective. The executive branch did not, however, seek Supreme Court review of *Kennedy*.

As the result of *Kennedy* v. *Sampson*, President Ford indicated that he would not invoke the pocket veto power during an intrasession recess. Moreover, in view of the functional affinity between the pocket veto and recess appointment powers, Presidents during recent years have been hesitant to make recess appointments during intrasession recesses of the Senate.

We have carefully reexamined the pertinent opinions of the Attorneys General and have concluded that we should follow the opinions of Attorney General Daugherty and Acting Attorney General Walsh, which hold that the President is authorized to make recess appointments during a summer recess of the Senate of a month's duration. The decision in *Kennedy* does not require a departure from those rulings. While the Pocket Veto and Recess Appointment Clauses deal with similar situations, namely, the President's powers while Congress is not in session, they, nevertheless, are not identical. The Pocket Veto Clause deals with an adjournment of the Congress that prevents the return of a bill, the Recess Appointment Clause with a recess of the Senate. If the Founding Fathers had wanted the two clauses to cover the same situation, it is reasonable to assume that they would have selected identical language for both. *See, Holmes* v. *Jennison*, 14 Pet. 540, 570–571 (1840). Moreover, the effect of a pocket veto and of a recess appointment is different. A pocket veto is final. It kills the legislation absolutely and it can be revived only by resuming the legislative process from the beginning. A recess [illegible]

Congress can force the recess appointee to resign by rejecting his nomination. Pursuant to an annual appropriation rider, a rejection has the effect of cutting off his compensation.[3] Finally, since, as pointed out above *Kennedy* v. *Sampson* is in conflict with an important aspect of the decision of the Supreme Court in the *Pocket Veto Case, supra*, we do not consider it the last word on the question whether the President may exercise his pocket veto power during an intrasession adjournment of a month's duration.

Should the President decide to exercise his recess appointment power during the forthcoming recess of the Senate, the following technical points should be considered.

A. If the vacancy existed while the Senate was in session, the recess appointee can be compensated pursuant to 5 U.S.C. § 5503, only if: the vacancy arose within 30 days of the end of the session of the Senate, or, if a nomination for the office was pending before the Senate at the end of the session, or if a nomination for the office was rejected by the Senate within 30 days before the end of the session. In addition, a nomination to fill the vacancy referred to above must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. No nomination need be submitted where the vacancy occurred during the recess of the Senate.

B. A recess appointment presupposes the existence of a vacancy. If there is an incumbent in office the recess appointment in itself does not effect a removal of the incumbent so as to create a vacancy. *See, Peck* v. *United States*, 39 Ct. Cl. 125 (1904); 23 Op. Atty Gen. 30, 34-35 (1900). Before the President can exercise his recess appointment power in such a case he must exercise his constitutional removal power to the extent it is available, or, if not available, the incumbent must resign.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

Lee Neil Stabler vs. Jimmy Carter, Civil Action No. 78-2028 - U.S. District Court for D.C. January 8, 1979, re Federal Election Commission's request the Commission dismiss Stabler's complaint by granting a recess appointment to Mr. Harry Stabler on holding over when he did not resign or was removed by the President